

July 27, 2005

Kent County - Civil Division (739-7641)

Mr. Robert P. Reeder  
131 Hiawatha Lane  
Dover, DE 19904

RE: **Freedom of Information Act Complaint  
Against the Capital School District**

Dear Mr. Reeder:

On May 24, 2005, our Office received your letter alleging that the Capital School District (“the School District”) violated the public records requirements of the Freedom of Information Act, 29 *Del. C.* Chapter 100 (“FOIA”).

By e-mail dated May 11, 2005, you asked to “review and/or copy all interview questions and score keepers [*sic*] written responses/scoring grades concerning the interview/hiring process that took place for my replacement in driver education in June/July/August 2004.” By letter dated May 13, 2005, the Superintendent responded to your request: “Section 10002(g)(1) [of FOIA] provides that personnel records, the disclosure of which would constitute an invasion of privacy, shall not be deemed public. Accordingly, the interview questions will be provided and are enclosed. The interviewers’ assessments of the qualifications and abilities of the applicants will

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not be provided. The disclosure of such assessments would violate the personal privacy rights of the applicants, and are thus not deemed public records.”

You contend that the applicant score sheets are not exempt from disclosure under FOIA as part of a personnel file of an employee of the School District. You also contend that the School District waived any privacy exemption from disclosure under FOIA because it “made portions of the documents I am requesting available to the Capital Education Association during a mediation process which took place earlier this year thus negating any rights to confidentiality if indeed that right existed in the first place.”

By letter dated May 26, 2004, we asked the School District to respond to your complaint by June 13, 2005 (taking into account the Memorial Day holiday weekend). We received the School District’s response on June 13, 2005. On June 30, 2005, we asked the School District for additional information, which we received that same day. On July 5, 2005, we asked the School District for additional information, which we received on July 7, 2005.

According to the School District, FOIA recognizes that individual applicants for a public job have protected privacy interests “by permitting a public body to call for an executive session closed to the public for the purpose of ‘Discussion of an individual citizen’s qualifications to hold a job or pursue training unless the citizen requests that such a meeting be open. See 29 *Del. C.* §10004(b)(1).’” The School District maintains that those same privacy interests should protect records that reflect a job applicant’s qualifications.

As for your waiver argument, the School District responds that “[a] limited disclosure of records to a union representing employees in [a mediation] is not a waiver of personal privacy rights

protecting confidential documents from public disclosure.”

### Relevant Statutes

FOIA requires that “[a]ll public records shall be open for inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body.” 29 *Del. C.* § 10004(a).

FOIA exempts from disclosure “[a]ny personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy.” *Id.* §10002(g)(1).

FOIA also exempts from disclosure “[a]ny records specifically exempted from public disclosure by statute or common law.” *Id.* §10002(g)(6).

FOIA authorizes a public body to meet in executive session to discuss “[p]ersonnel matters in which the names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such a meeting be open.” *Id.* §10004(b)(9).

FOIA authorizes a public body to meet in executive session to discuss “an individual citizen’s qualifications to hold a job or pursue training unless the citizen requests that such a meeting be open.” *Id.* §10004(b)(1).

Legal Authority

FOIA exempts from the definition of a public record “[a]ny personnel file, the disclosure of which would constitute an invasion of personal privacy.” 29 *Del. C.* §10002(g)(1). And FOIA authorizes a public body to meet in executive session to discuss “[p]ersonnel matters in which the names, competency and abilities of individual employees . . . are discussed, unless the employee . . . requests that such a meeting be open.” *Id.* §10004(b)(9).

For public employment, FOIA authorizes a public body to meet in executive session to discuss their qualifications, but there is no corresponding provision in the public records section of FOIA specifically addressing job applicant records (like there is for personnel records).

We have previously determined that when FOIA refers to “personnel” it does not mean an applicant for public employment. *See Att’y Gen. Op.* 03-IB210 (Sept. 3, 2002). The School District therefore cannot rely on FOIA’s personnel file exemption to withhold the job applicant score sheets you requested, but must rely on another exemption.<sup>1</sup>

FOIA does not apply to documents “exempted from public disclosure by statute or common law.” 29 *Del. C.* §10002(g)(6). The courts in Delaware have recognized a “common law right of privacy.” *See Board of Education of Colonial School District v. Colonial Education Association*, C.A. No. 14383, 1996 WL 104231, at p.7 (Del. Ch., Feb. 28, 1996) (Allen, C.), *aff’d*, 685 A.2d 361 (1996); *The News-Journal Co. v. Billingsley*, C.A. No. 5774, 1980 WL 3043 (Del. Ch., Nov. 20,

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<sup>1</sup> FOIA’s personnel exemption might apply if the job application and related materials for the person hired are then placed in that employee’s personnel file in the School District’s Human Resources Office. The record indicates, however, that all of the job application materials are placed in a separate file for twelve months at which time they are discarded.

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1980) (Hartnett, V.C.).

The legal issue raised by your FOIA complaint is whether the common law right of privacy exempts records relating to the job qualifications of applicants for public employment from disclosure. We believe that it does because the exemptions for public records under FOIA should parallel the statute's authorization for a public body to meet in executive session to discuss the applicants' job qualifications. Our conclusion is supported by Section 10004(f) of FOIA, which exempts from public disclosure minutes of executive session "and any public records pertaining to executive sessions." <sup>2</sup>

We have previously determined that a town council could meet in executive session to discuss the candidates for town manager. "For sound public policy reasons, job applicants have a right of privacy to information disclosed during the application process, at least until they are hired. '[D]isclosure may embarrass or harm applicants who failed to get a job. Their present employers, co-workers, and prospective employers, should they seek new work, may learn that other people were deemed better qualified for a competitive appointment.'" *Att'y Gen. Op.* 99-IB03 (Apr. 28, 1999) (quoting *Core v. United States*, 730 F.2d 946, 949 (4<sup>th</sup> Cir. 1984)). *See also Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 806 P.2d 348, 352 (Ariz. 1991) (en banc) (publicity attendant to job search may result "in lesser qualified" applicants and "chill the attraction of the best possible candidates for the position").

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<sup>2</sup> In earlier opinions, we have determined that FOIA's exceptions to meet in executive session to discuss "job applicant qualifications" and "personnel" do not apply to independent contractors. *See Att'y Gen. Op.* 05-IB02 (Jan. 12, 2005) (city solicitor); *Att'y Gen. Op.* 05-IB14 (June 8, 2005) (lobbyist). Counsel for the School District has confirmed that student driving instructors are public employees of the School District.

We also have previously determined that a school board could lawfully meet in executive session to discuss the applicants for the job of school superintendent. *See Att’y Gen. Op.* 02-IB17 (Aug. 6, 2002) (“interviews an discussion of the applicant’s job qualifications” are “appropriate subjects for executive session”).

Most recently, we determined that a county council could lawfully meet in executive session to interview the two finalists for the position of counsel to the council and then discuss their comparative qualifications. *See Att’y Gen. Op.* 05-IB12 (May 9, 2005). We found that the two final applicants had a reasonable expectation of privacy “until such time as the Council voted to hire one of them and extend an offer of public employment.”

After receiving applications for a new driver education instructor, the School District’s Head of the Human Resources Office appointed a screening/selection panel to review the applications and interview the applicants who met the screening criteria. For the interviews, the panel used a uniform question list about the applicant’s job qualifications.<sup>3</sup> Under the School District’s Hiring Policy, “The purpose of the questioning should determine if the applicant meets the selection criteria and how well the applicant could perform the duties of the job.”

Under the Hiring Policy, after each interview panel members recorded their responses “on the selection criteria score sheet. . . . Each panel member individually ranks or scores applicants. These rankings or scores shall then be compared or totaled and the top applicants agreed upon by the panel in order of merit.”

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<sup>3</sup> For example, Question 1 asked: “Please tell us about your qualifications for this position?” Question 7 asked: “Describe your strengths and weaknesses as a driver’s education instructor?”

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You asked the School District for two types of information: the questions used to interview the applicants for driver education instructor; and the interview panel score sheets for each applicant. The School District provided you with the interview questions under cover of letter dated May 13, 2005, but withheld the score sheets to protect “the personal privacy rights of the applicants.”

We do not agree with the School District that Section 10002(g)(1) of FOIA (personnel record exemption) applies to the score sheets, but we believe that this information is protected under another exemption, Section 10002(g)(6) (common law informational privacy).

Although FOIA does not have an express exemption for documents relating to the job applicant process, the statute authorizes a public body to meet in executive session to discuss “an individual citizen’s qualifications to hold a job.” 29 *Del. C.* §10004(b)(1). This exemption for executive session would have little if any practical meaning if the job application packets reviewed by the members of the public body, and their notes or scoring cards, were public records under FOIA.

We do not believe that the School District waived any personal privacy interests when it provided information regarding job applicant qualifications to the Capital Education Association in connection with a grievance under the collective bargaining agreement. The first step in the grievance process was mediation with a federal mediator. Mediation is “a private, confidential informal dispute resolution process in which an impartial and neutral third person, the mediator, assists disputing parties to resolve their differences. . . . A mediator may encourage and assist the parties to reach their own mutually acceptable settlement by facilitating and exchange of information between the parties, helping to clarify issues and interests, ensuring that relevant information is

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brought forth, and assisting the parties to voluntarily resolve their dispute.” In re Estate of Stukey.  
100 P.3d 114, 125 (Mont. 2004).

For mediation to work, the parties must be able to exchange documents and information with the assurance of confidentiality. We do not believe that documents which are exempt from disclosure under FOIA lose their exemption when a public body makes them available to a public employee union as part of a confidential mediation process required by the collective bargaining agreement.



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Conclusion

For the foregoing reasons, we determine that the School District did not violate the public records requirements of FOIA by denying you access to the scoring sheets of interview panel members compiled during the applicant selection process for a new driver education instructor. We believe that information is exempt from disclosure under FOIA to protect individual privacy for the same reasons that the statute expressly authorizes a public body to meet in private to discuss the an individual's qualifications for public employment.

Very truly yours,

W. Michael Tupman  
Deputy Attorney General

APPROVED

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Malcolm S. Cobin  
State Solicitor

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cc: The Honorable M. Jane Brady  
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